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7 MARK A. PASCHAL,  
8 Plaintiff,  
9 v.  
10 CITY AND COUNTY OF SAN  
11 FRANCISCO, et al.,  
12 Defendants.

Case No. [22-cv-03604-WHO](#)

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**ORDER GRANTING MOTION TO  
DISMISS**

27 Re: Dkt. No. 36

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29 Defendants City and County of San Francisco (“the City”), Diego Sanchez, and Adrian  
Putra (collectively “the defendants”) move to dismiss a Second Amended Complaint (“SAC”)  
brought by plaintiff Mark Paschal, who alleges that the defendants discriminated against him  
based on his race and otherwise violated his constitutional rights when San Francisco’s Office of  
Short-Term Rentals (“OSTR”) denied his application to run a short-term rental business out of his  
home. The SAC is largely unchanged from Paschal’s First Amended Complaint (“FAC”), and for  
the same reasons that I dismissed the FAC I will dismiss the SAC. It does not state facts that  
plausibly allege violations of the First or Fourteenth Amendments to further *Monell* or section  
1983 claims. It does not state a claim under Title VI of the Civil Rights Act of 1964. Although  
the SAC clarifies that the final claim is asserted under California Government Code section 815.2,  
Paschal has not alleged any wrongdoing by Sanchez or Putra for which the City could be liable.  
Because Paschal did not make any substantive attempt to cure the deficiencies that I previously  
identified and because amending his claims would be futile, they are DISMISSED with prejudice.

**BACKGROUND**

Paschal, who is African American, owns a home located on Hayes Street in San Francisco.  
SAC [Dkt. No. 33] ¶ 7. In 2015, he and his sister began operating a short-term rental business out

1 of that location. *Id.* ¶ 21.

2 As with Paschal’s prior complaint, “[t]o understand the context of his claims, one must  
3 understand the statutory and regulatory scheme under which they arise.” *See* Order Granting Mot.  
4 to Dismiss (“First MTD Order”) [Dkt. No. 29] 1:27-2:1. This scheme is set forth in San Francisco  
5 Ordinance No. 218-14 governing short-term residential rentals, for which the defendants request  
6 judicial notice. *See* Defs.’ RJN [Dkt. No. 36-1] Ex. A. I will take notice because the facts within  
7 can be accurately and readily determined from sources whose accuracy cannot reasonably be  
8 questioned and because “[m]unicipal ordinances are proper subjects for judicial notice.” *See* Fed.  
9 R. Evid. 201(b)(2); *Tollis, Inc. v. Cnty. of San Diego*, 505 F.3d 935, 938 n.1 (9th Cir. 2007)  
10 (citation omitted). The full framework is described in my prior Order dismissing Paschal’s claims,  
11 which I incorporate by reference here. *See* First MTD Order at 2:2-3:4. Briefly:

12 Permanent residents of San Francisco may offer their homes as short-term rentals under  
13 certain conditions. Defs.’ RJN, Ex. A, S.F. Ord. No. 218-14 at 1:3-11 (Oct. 27, 2014). They may  
14 do so if, among other things, they (1) occupy the home for no less than 275 days out of the  
15 calendar year in which the home is rented as a short-term residential rental and (2) maintain  
16 records for two years demonstrating compliance with the relevant laws, “including but not limited  
17 to information demonstrating primary residency,” the number of days per calendar year that they  
18 occupied the home, and the number of days that it was rented. S.F. Admin. Code § 41A.5(g)(1).

19 Residents must apply for a short-term rental certificate that “shall contain information  
20 sufficient to show” that their home is their primary residence and that they are the home’s  
21 permanent resident. *See id.* § 41A.5(g)(2)(C), (3)(A). Primary residency “shall be established by  
22 showing the residential unit is listed as the applicant’s residence on at least two of the following:  
23 motor vehicle registration; driver’s license; voter registration; tax documents . . . or utility bill.”  
24 *Id.* § 41A.5(g)(3)(A). The city’s Planning Department “may require any other additional  
25 information necessary to show” compliance with the short-term residential provisions. *Id.* If a  
26 resident’s application is approved, their certificate lasts for two years, at which point they may file  
27 a renewal application that contains “sufficient information to show that the applicant is the  
28 permanent resident and has occupied the unit for at least 275 days of each of the two preceding

1 calendar years.” *See id.*

2 After renting Paschal’s home since 2015, Paschal and his sister submitted a renewal  
3 application in June 2019. *See SAC ¶¶ 55-56.* They never received a response. *Id. ¶ 56.*

4 Paschal and his sister reapplied in February 2021. *Id. ¶ 62.* Again, they received no  
5 response. *Id. ¶ 63.* By this point, the COVID-19 pandemic had begun. *See id. ¶ 62.* Concerned  
6 that the pandemic had “essentially shut the industry down” and by the lack of response from the  
7 OSTR, the Paschals placed an ad for a “lodger” tenant “[t]o keep some form of income coming  
8 in.” *Id. ¶ 64.* Two weeks later, they removed the ad “due to a change of heart.” *See id. ¶ 65.*

9 On May 13, 2021, the OSTR denied Paschal’s application “because of the two week ad  
10 placed in February.” *Id. ¶ 67.* In its denial letter, the OSTR told Paschal that “[b]ased on a review  
11 of publicly available information . . . it appears that you are not the permanent resident of the  
12 residential unit . . . being offered for short-term rentals.” *Id. ¶ 79* (citing Ex. 4).<sup>1</sup> The letter said  
13 that it did not appear that Paschal lived in the unit for at least 275 nights in 2020, citing a Zillow  
14 listing offering the apartment as a “semi-furnished long-term rental” that was “available for  
15 immediate occupancy.” *See id. ¶ 79; Ex. 4.* It also noted that per public records, Paschal was  
16 registered to vote at another address, located on Peralta Avenue in San Francisco. *See id., Ex. 4.*

17 Paschal, who denies ever moving from his home, requested a meeting with OSTR and the  
18 mayor. *Id. ¶¶ 66, 75.* In June 2021, he met with Putra, who denied his application, and Sanchez,  
19 Putra’s supervisor. *See id. ¶¶ 77-78.* Putra said that the “primary concern were rules that  
20 mandated the host live in an apartment the required number of days a year,” and that records  
21 showed that Paschal was registered to vote at another address. *Id. ¶ 78.* Paschal alleges that  
22 Sanchez and Putra ignored his driver’s license, which listed the Hayes Street address as his  
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24 <sup>1</sup> I will consider the letter without converting the motion to dismiss into one for summary  
25 judgment, as the letter is both attached to the SAC and incorporated by reference. *See United*  
26 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“A court may . . . consider certain materials—  
27 documents attached to the complaint, documents incorporated by reference in the complaint, or  
28 matters of judicial notice—without converting the motion to dismiss into a motion for summary  
judgment.”) (citations omitted). The letter’s contents are described and it is integral to Paschal’s  
complaint. *See Tunac v. United States*, 897 F.3d 1197, 1207 n.8 (9th Cir. 2018) (“Although mere  
mention of the existence of a document is insufficient to incorporate the contents of a document,  
the document is incorporated when its contents are described and the document is integral to the  
complaint.”) (citation and quotation marks omitted).

1 residence. *Id.* ¶ 80.

2 Paschal alleges that Putra and Sanchez discriminated against him because of his race in  
3 denying his short-term rental certificate. *Id.* ¶ 83. He filed a complaint of racial discrimination  
4 and unfair business practices against the OSTR. *Id.* ¶ 84. Despite doing so, he alleges, Sanchez  
5 still heard Paschal's appeal of the denial of his short-term rental certificate, during which Sanchez  
6 asked "retaliatory arbitrary questions." *See id.* ¶¶ 3, 85, 94. Paschal alleges that these questions,  
7 including whether a stove in his home was permitted, "were not asked [of] any other applicants or  
8 appellant but meant to harass" him. *See id.* ¶¶ 92-95.

9 In June 2022, Paschal filed this suit against the City, OSTR, and five Doe defendants,  
10 alleging a *Monell* claim, a violation of 42 U.S.C. § 1983 based on the Equal Protection Clause,  
11 retaliation under Title VI of the Civil Rights Act, and "public entity liability: acts and omissions of  
12 employees." Dkt. No. 1. After the defendants filed a motion to dismiss, Paschal filed the FAC,  
13 adding Putra and Sanchez as defendants. Dkt. Nos. 7, 17.

14 Upon a motion from the defendants, I dismissed the claims in the FAC, but granted  
15 Paschal leave to amend all but his Title VI against Sanchez, which was dismissed with prejudice  
16 because such a claim cannot lie against an individual. Dkt. No. 29. After Paschal filed the SAC—  
17 asserting the same *Monell*, section 1983, and Title VI claims, and clarifying that the fourth claim  
18 is brought under California Government Code section 815.2—the defendants again moved to  
19 dismiss. Dkt. Nos. 33, 36. Pursuant to Civil Local Rule 7-1(b), this matter is suitable for  
20 disposition without oral argument.

## 21 **LEGAL STANDARD**

22 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
23 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, the  
24 plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*  
25 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff  
26 pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for  
27 the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There  
28 must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts

1 do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to  
2 “raise a right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555, 570.

3 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the  
4 court accepts his allegations as true and draws all reasonable inferences in his favor. *See Usher v.*  
5 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to  
6 accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or  
7 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

8 If the court dismisses the complaint, it “should grant leave to amend even if no request to  
9 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
10 by the allegation of other facts.” *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In  
11 making this determination, the court should consider factors such as “the presence or absence of  
12 undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous  
13 amendments, undue prejudice to the opposing party and futility of the proposed amendment.” *See*  
14 *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

## 15 DISCUSSION

16 Many of the problems in Paschal’s FAC persist in the SAC. The SAC remains difficult to  
17 follow at times and includes superfluous allegations that are not relevant to his claims. It again  
18 makes passing references to other constitutional violations (i.e., of the Fourth and Fifth  
19 Amendments) without expressly asserting those claims (which would be too conclusory to  
20 proceed regardless). *See, e.g.*, SAC ¶¶ 135. It does not appear that Paschal took much, if any, of  
21 my prior Order to heart. The SAC is substantively identical to the FAC; the most notable change  
22 is the addition of allegations about California law on lodgers and San Francisco’s Rent Ordinance.  
23 *See id.* ¶¶ 110-120. It again asserts a Title VI claim against Sanchez, despite my dismissal of that  
24 claim with prejudice. *See id.* ¶¶ 159-174; First MTD Order at 1:21-23. Most importantly, the  
25 SAC does not include new allegations that plausibly state Paschal’s claims.

26 Although the SAC is substantively identical to the FAC, and much of my prior analysis  
27 carries over, I will address each claim of Paschal’s in turn.

1           **I.        MONELL**

2           Municipalities may be held liable under section 1983 when an official policy or custom  
3 causes a constitutional violation. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).  
4 But local governments may not be sued under section 1983 for injuries inflicted solely by their  
5 employees or agents. *Id.* at 694. To state a *Monell* claim, a plaintiff must plausibly plead the  
6 following: “(1) that [he] possessed a constitutional right of which he was deprived; (2) that the  
7 municipality had a policy, custom, or practice; (3) that the policy, custom, or practice amounted to  
8 deliberate indifference to [his] constitutional rights; and (4) that the policy, custom, or practice  
9 was the moving force behind the constitutional violation.” *Torres v. Saba*, No. 17-CV-06587-SI,  
10 2019 WL 111039, at \*6 (N.D. Cal. Jan. 4, 2019) (citations omitted).

11           Paschal attempts to plead a *Monell* claim against the City, again alleging that the denial of  
12 his short-term rental certificate violated his First Amendment rights to (1) run a “lodger” business  
13 that provided a way for him to “engage as the ‘grio’” of San Francisco’s Fillmore District and (2)  
14 find roommates. *See SAC ¶¶ 127, 129.*<sup>2</sup> As I stated in my previous Order, although the First  
15 Amendment prohibits the government from enacting laws that abridge the freedom of speech, the  
16 Supreme Court has distinguished between “restrictions on protected expression” and “restrictions  
17 on economic activity or, more generally, on nonexpressive conduct.” *See* First MTD Order at  
18 6:14-19 (citing U.S. Const. amend. I; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)). In the  
19 Court’s words, “the First Amendment does not prevent restrictions directed at commerce or  
20 conduct from imposing incidental burdens on speech.” *Sorrell*, 564 U.S. at 567.

21           The City’s short-term residential rental provisions regulate economic activity, not speech.  
22 As defendants assert, denying Paschal’s permit did not limit what he could or could not  
23 communicate or restrict when, where, or how he could speak but merely prevented him from  
24 renting out his property for short-term stays, which is conduct, not speech. *See* Mot. to Dismiss  
25 (“MTD”) [Dkt. No. 36] 10:1-2.

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<sup>2</sup> According to the SAC, “[g]rio is a word that means storyteller in Africa,” and in the United  
28 States refers to a “person telling stories about the histories of African-American communities  
where they lived.” SAC ¶ 127.

1 Paschal contends that he has a right to run a business based on storytelling—that by renting  
2 out his home through Airbnb, he can work as a griot and “give . . . tourists tours of the places that  
3 held significant civil rights movements and historic jazz spots” in San Francisco. *See SAC ¶¶*  
4 127-128. But, as before, “the connection between that storytelling and the denial of his short-term  
5 rental certificate is incidental at best.” First MTD at 7:11-13. Nothing on the face of the  
6 municipal provisions limits when, where, or how someone can speak. Rather, they state the  
7 requirements that San Francisco residents must meet to rent their homes on a short-term basis.  
8 This is a regulation of nonexpressive, economic activity—not speech. *See Sorrell*, 564 U.S. at  
9 567. I said this when I dismissed the FAC, and the SAC does not add any allegations to this cause  
10 of action that change my analysis, including any that support a reasonable inference that the  
11 economic regulations at issue “target certain types of speech and thereby raise the specter of  
12 government discrimination.” *See Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954,  
13 962 (9th Cir. 2021) (“economic regulations can still implicate the First Amendment when they are  
14 not ‘generally applicable’ but instead target certain types of speech and thereby raise the specter of  
15 government discrimination”).

16 Nor does the SAC plausibly allege that the municipal policy violated Paschal’s right to  
17 choose his roommates. The Supreme Court has held that “[t]he freedom to enter into and carry on  
18 certain intimate or private relationships is a fundamental element of liberty protected by the Bill of  
19 Rights,” and that to determine whether a relationship is so protected, courts consider the “size,  
20 purpose, selectivity, and whether others are excluded from critical aspects of the relationship.”  
21 *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987). The Ninth  
22 Circuit has held that the “roommate relationship easily qualifies,” as people “generally have very  
23 few roommates; they are selective in choosing roommates; and non-roommates are excluded from  
24 the critical aspects of the relationship, such as using the living spaces.” *Fair Hous. Council of San  
25 Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220-21 (9th Cir. 2012).

26 The problem remains that the SAC alleges that denying Paschal’s short-term rental  
27 application “affected his *business* relationships, not his roommate relationships.” *See* First MTD  
28 Order at 8:5-6 (emphasis in original); *see also* *Fair Hous.*, 666 F.3d at 1220 (“a business

1 transaction between a tenant and landlord is quite different from an arrangement between two  
2 people sharing the same living space”). Like the FAC, the SAC repeatedly references Paschal’s  
3 short-term rental “business.” *See, e.g.*, SAC ¶¶ 1 (describing “attempts to shut down a family  
4 business”); 32-34 (describing the Paschals’ efforts to “open up a short term rental business to  
5 lodgers from all over the world,” and the “purpose of this business”); 127 (describing Paschal’s  
6 right “to run a ‘lodger’ business,” and that “[t]his business is a way for [him] to engage as the  
7 ‘grio’” of the Fillmore District). The SAC does not describe a roommate relationship between  
8 Paschal and the lodgers; although they may share living spaces, the relationship is based on a  
9 business transaction.

10 The SAC alleges that under California Civil Code section 1946.5, people who use Airbnb  
11 to rent rooms in San Francisco are “automatically given tenant rights because Mark Paschal is  
12 forced to live with the people he rents rooms to.” *See id.* ¶ 111. It further alleges that the City  
13 “mandates that every person using Airbnb for a ‘short-term rental’ now must use Airbnb to  
14 become a ‘boarding house’” because the City believes “it would keep rents lower within San  
15 Francisco.” *See id.* ¶¶ 110, 115. These allegations are difficult to follow, but to the extent that  
16 Paschal alleges that boarding houses “give[] lodgers 100% tenant rights because they are  
17 considered roommates,” those allegations are too conclusory to save his claim. *See id.* ¶ 118.

18 Paschal’s *Monell* claim fails because he has not shown a plausible constitutional violation.  
19 *See Lockett v. Cnty. of Los Angeles*, 977 F.3d 737, 741 (9th Cir. 2020) (*Monell* claims are  
20 “contingent on a violation of constitutional rights”) (citation omitted). It is DISMISSED.

## 21 II. SECTION 1983

22 Section 1983 establishes a cause of action for violations of the federal Constitution and  
23 laws by officials acting under the color of law. *See* 42 U.S.C. § 1983. It is not a standalone  
24 source of substantive rights; rather, it provides a “method for vindicating federal rights elsewhere  
25 conferred.” *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

26 Paschal’s section 1983 claim is based on an alleged “violation of the Equal Protection  
27 Clause granted in Title VI.” *See* SAC ¶ 143. Although it remains unclear whether he relies on the  
28 Fourteenth Amendment or Title VI, my analysis is the same for each. *See N.Y. through Yu v. San*

1        *Ramon Valley Unified Sch. Dist.*, No. 17-CV-03906-MMC, 2018 WL 4599680, at \*6 (N.D. Cal.  
2        Sept. 21, 2018) (“Title VI proscribes only those racial classifications that would violate the Equal  
3        Protection Clause; consequently, where a plaintiff’s claim that he was deprived of equal protection  
4        on account of his race fails on its merits, a Title VI claim based on the same facts likewise fails.”)  
5        (citation and quotation marks omitted).

6        A plaintiff asserting a claim under the Equal Protection Clause must show that he was  
7        intentionally treated differently than other similarly situated individuals. *Recinto v. U.S. Dep’t of*  
8        *Veterans Affs.*, 706 F.3d 1171, 1177 (9th Cir. 2013). The plaintiff must show that “the defendants  
9        acted with an intent or purpose to discriminate against the plaintiff based upon membership in a  
10        protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Purposeful  
11        discrimination arises when the decisionmaker acts “because of, not merely in spite of, the action’s  
12        adverse effects upon an identifiable group.” *See Iqbal*, 556 U.S. at 676-77 (citation and  
13        modifications omitted).

14        There are no allegations in the SAC that plausibly support that the defendants acted with  
15        an intent or purpose to discriminate against Paschal based upon his race. Paschal alleges that  
16        “[i]ntentional discrimination happened against Mark Paschal when Mr. Putra used a photo of”  
17        Paschal and his sister “as a reason to ‘flag’ Mark’s ability to renew his business permit.” *See SAC*  
18        ¶ 144. There is no support for the allegation that Putra flagged the application for that reason and  
19        the SAC is clear that the OSTR denied Paschal’s application because it appeared that he did not  
20        live at the Hayes Street residence. *See id.* ¶ 78-79, Ex. 4. There are no other allegations, besides  
21        Putra seeing the photo, to buttress the allegation of intentional discrimination.

22        Nor has Paschal plausibly alleged that he was treated differently from similarly situated  
23        individuals. He again relies on contentions about Airbnb’s founders, which fail for the same  
24        reasons as they did before: the circumstances presented by the Airbnb founders and Paschal are  
25        not remotely comparable. *See id.* ¶¶ 146-151; First MTD Order at 10:22-11:3. As I explained in  
26        my prior Order, Paschal does not allege that Airbnb’s founders were granted a short-term rental  
27        certificate while he was not. *See* First MTD Order at 10:26-27. His allegations that Airbnb  
28        operated for six years “before they became legal” and “did so without penalty” predate both the

1 city regulations at issue and Paschal’s attempts to obtain a short-term rental certificate, which both  
2 began in 2015. *See* SAC ¶¶ 21, 147-148; S.F. Ord. No. 218-14 § 4(b); First MTD Order at 10:27-  
3 11:3. And, as alleged in the SAC, Airbnb is a multi-billion-dollar company, while Paschal is a  
4 small business oner. *See* SAC ¶¶ 21, 50.

5 In his opposition, Paschal again notes that the OSTR told him that it does not keep  
6 statistics of how short-term rental policies are enforced against black and white homeowners, and  
7 that in lieu of such data, “the evidence of racial discrimination presented is how [San Francisco]  
8 treated the white founders of Airbnb versus how they treated the Paschal family.” *See* Oppo. [Dkt.  
9 No. 40] 20:18-21:12. While perhaps there are other comparisons that could plausibly allege an  
10 equal protection claim, this one does not.

11 To show that he was racially discriminated against, Paschal relies on allegations that (1)  
12 Sanchez appointed himself the adjudicator of his racial discrimination complaint; (2) the OSTR  
13 asked him questions that “are asked to black people way more than white people” and were not  
14 asked by any other applicants or appellant but meant to harass” Paschal; and (3) his request for a  
15 meeting with the mayor was denied. *See id.* at 22:16-23:13; SAC ¶¶ 94-95, 150. But the SAC  
16 undercuts these allegations. It alleges that Sanchez appointed himself the adjudicator of Paschal’s  
17 appeal of his permit denial, not his complaint against the OSTR, and that no one investigated his  
18 discrimination complaint. *See* SAC ¶¶ 3, 10 (“The City did not investigate this allegation, did not  
19 call Mr. Paschal for an interview or follow up after the claim of discrimination.”). As alleged, the  
20 questions that Sanchez asked during the appeal were focused on whether a stove in Paschal’s  
21 home was permitted. *Id.* ¶¶ 92, 94. This appears to be within the bounds of the OTSR’s purview,  
22 as residents who offer their homes as short-term rentals must demonstrate that their home “is not  
23 subject to any outstanding . . . Code enforcement.” S.F. Admin. Code § 41A.5(g)(1)(H). And  
24 Sanchez told Paschal (in an email attached to the SAC) that he could not schedule a meeting  
25 between Paschal and the mayor because he did not have the access or ability to do so. *See* SAC ¶¶  
26 75-77, Ex. 3.

27 I cannot reasonably infer from Paschal’s allegations that he was intentionally treated  
28 differently from similarly situated individuals because of his race. He has not alleged a violation

1 of the Equal Protection Clause or Title IV, upon which his section 1983 claim relies. The section  
2 1983 claim is also DISMISSED.

### 3 III. TITLE VI

4 Under Title VI of the Civil Rights Act, “[n]o person in the United States shall, on the  
5 ground of race, color, or national origin, be excluded from participation in, be denied the benefits  
6 of, or be subjected to discrimination under any program or activity receiving federal financial  
7 assistance.” 42 U.S.C. § 2000(d). Title VI “only extends to cases of intentional discrimination  
8 and not disparate impact.” *West v. City & Cnty. of San Francisco*, No. 21-CV-02370-EMC, 2022  
9 WL 1556415, at \*10 (N.D. Cal. May 17, 2022) (citations omitted). To state a claim under Title  
10 VI, a plaintiff must allege that: “(1) the entity involved is engaging in racial discrimination; and  
11 (2) the entity involved is receiving federal financial assistance.” *Fobbs v. Holy Cross Health Sys.*  
12 *Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994) *overruled in part on other grounds by Daviton v.*  
13 *Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001).

14 Paschal continues to style his Title VI as a retaliation claim, not a discrimination claim.  
15 See SAC ¶ 159-174. It remains unclear whether the Ninth Circuit recognizes such a claim; as I  
16 explained in my prior Order, “it does not appear, based on my own review of the case law, that the  
17 Ninth Circuit has expressly articulated” what the elements of it are. See First MTD Order at  
18 11:18-20. I instructed the parties to specifically address this should Paschal’s amended complaint  
19 include a Title VI claim based on retaliation. See *id.* at 11 n.4.

20 Paschal has not identified any Supreme Court or Ninth Circuit precedent expressly stating  
21 that a Title VI claim may arise from retaliation. He again contends that it is “well-settled that Title  
22 VI supports retaliation claims,” but generally relies on out-of-circuit decisions in support. See  
23 SAC ¶ 172. He points to one 2005 case from the Eastern District from Washington, which stated  
24 that “retaliation claims are recognized under Title VI.” See *id.*; see also Oppo. at 24:17-25:20  
25 (both citing in part *Gutierrez v. Wash. Dep’t of Soc. & Health Servs.*, No. CV-04-3004-RHW,  
26 2005 WL 2346956, at \*5 (E.D. Wash. Sept. 26, 2005)). But the court made that conclusion based  
27 on the Supreme Court’s recognition of an implied cause of action under Title IX for retaliation and  
28 the Court’s consistent interpretation of Title IX and Title VI. See *Gutierrez*, 2005 WL 2346956, at

1 \*5. I too relied on *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173-74 (2005) and  
2 the substantial similarities between Title IX and Title VI in my previous consideration of  
3 Paschal's claim. *See* First MTD Order at 11:18-12:17.

4 Assuming that such a claim does exist, Paschal's Title VI claim focuses on alleged actions  
5 by Sanchez. *See* SAC ¶¶ 159-174. As I made clear in my prior Order, this claim cannot proceed  
6 against Sanchez because he is not a "program or activity receiving federal financial assistance."  
7 *See* First MTD Order at 13:7-15 (citing *West*, 2022 WL 1556415, at \*10) ("Title VI claims cannot  
8 be asserted against individual defendants because they are not the ones receiving federal  
9 funding."). Paschal alleges that he was "harmed as a protected class" and that black people "are  
10 impacted by the rules and procedures." *See* SAC ¶ 174. But if he intends to assert this claim  
11 against the City and the OSTR, his allegations are too conclusory to support it. I provided Paschal  
12 notice of these deficiencies in my prior Order. *See* First MTD Order at 13:7-15. His retaliation  
13 claim is DISMISSED.

#### 14 **IV. PUBLIC ENTITY LIABILITY**

15 Paschal does offer some clarity around his fourth cause of action, which is now asserted  
16 under California Government Code section 815.2. *See id.* ¶ 175. Under section 815.2, "[a] public  
17 entity is liable for injury proximately caused by an act or omission of an employee of the public  
18 entity within the scope of his employment if the act or omission would, apart from this section,  
19 have given rise to a cause of action against that employee or his personal representative." Cal.  
20 Gov't Code § 815.2(a). It further provides that "[e]xcept as otherwise provided by statute, a  
21 public entity is not liable for an injury resulting from an act or omission of an employee of the  
22 public entity where the employee is immune from liability." *Id.* § 815.2(b).

23 Paschal contends that the "City is vicariously liable for the acts of its employee[s], like Mr.  
24 Putra," that "[t]hey wrongfully denied his application to renew his short term rental business," and  
25 that the employees' "act, omission, failure to act, doings or gross negligence is the primary factor"  
26 in harming Paschal. *See* SAC ¶¶ 176, 179, 181.

27 Paschal has not plausibly alleged an act or omission by Sanchez or Putra that would give  
28 rise to a cause of action against them. Moreover, Paschal does not address the defendants'

1 argument that they are immune “from any tort liability for any alleged injury caused by the denial  
2 or revocation of, and/or refusal to issue [Paschal] a short-term rental certificate” under the state’s  
3 Tort Claims Act. *See* MTD at 20:10-28. In part, the Tort Claims Act shields public entities from  
4 liability for

5 an injury caused by the issuance, denial, suspension or revocation of, or by the  
6 failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate,  
7 approval, order, or similar authorization where the public entity or an employee of  
the public entity is authorized by enactment to determine whether or not such  
authorization should be issued, denied, suspended or revoked.

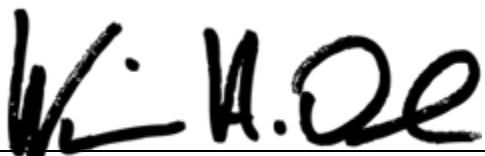
8 Cal Gov’t Code § 818.4. Paschal does not expressly mention this fourth cause of action in his  
9 opposition, let alone respond to the defendants’ argument. *See generally* Oppo. He has otherwise  
10 not plausibly alleged a claim under section 815.2. It too is DISMISSED.

## CONCLUSION

12 The SAC does not make any substantive attempt to cure the deficiencies that I identified  
13 when I dismissed the FAC. *See Moore*, 885 F.2d at 538. Some of those deficiencies, including  
14 the reassertion of a claim that was dismissed with prejudice, are repeated without any explanation.  
15 Given the basis for Paschal’s claims, amendment would be futile, as the allegations of other facts  
16 could not cure the remaining deficiencies. *See id.* The defendants’ motion to dismiss is  
17 GRANTED. Paschal’s claims are DISMISSED with prejudice.

## IT IS SO ORDERED.

19 Dated: February 10, 2023



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William H. Orrick  
United States District Judge